United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

affidavit

75-4221

To be argued by
MARY P. MAGUIRE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4221

ANTINUAEL COLATO,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

RESPONDENT'S BRIEF

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for Respondent.

MARY P. MAGUIRE,
THOMAS H. BELOTE,
Special Assistant United States Attorneys, Of Counsel.

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STATEMENT OF THE CASE

Petitioner, Atinuael Colato (Colato) petitions this Court for review of an order entered by the Board of Immigration Appeals on September 15, 1975. In that order the Board dismissed an appeal from the decision of the District Director dated March 24, 1975 which denied a visa petition filed by Colato's spouse to accord Colato the status of immediate relative pursuant to Section 201(b) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §1151(b), as the spouse of a United States citizen.

This petition for review was filed on October 7, 1975 and Colato's deportation has been stayed pursuant to Section 106(a)(3) of the Act, 8 U.S.C. §1105a(a)(3).

ISSUES PRESENTED

1. Whether this Court has jurisdiction to review the order of the Board of Immigration Appeals dated September 15, 1975.

2. Whether the Board of Immigration Appeals properly dismissed the appeal from the District Director's denial of the visa petition filed on behalf of the petitioner.

STATEMENT OF FACTS

Petitioner Antinuael Colato is an alien, a native and citizen of El Salvador. He was admitted to the United States on February 20, 1970 as a nonimmigrant visitor for pleasure and was authorized to remain in the United States until March 13, 1970. He failed to depart at the end of his authorized stay and remained in the United States without authority.

On June 9, 1973 Colato married Herminia Velez, a United States citizen born in Puerto Rico. On July 5, 1973 petitioner's spouse filed a petition to classify Colato as the immediate relative of a United States citizen and thus exempt him from the numerical limitations on visas available to natives of the Western Hemisphere and from the labor certification provisions

of Section 212(a)(14) of the Act, 8 U.S.C. §1182(a)(14). The visa petition was subsequently denied for lack of prosecution on February 22, 1974 after the couple and their prior attorney failed to appear on four occasions for an interview with respect to the visa petition.

On April 8, 1974 the petitioner was located by Service officers and deportation proceedings were instituted against him on that date by the issuance of an order to show cause and notice of hearing (T. 9).* At a deportation hearing held on April 10, 1974 the petitioner conceded his deportability and was granted the privilege of voluntary departure in lieu of deportation pursuant to Section 244(e) of the Act, 8 U.S.C. §1254(e). The Immigration Judge also entered an alternate order of deportation to El Salvador in the event the petitioner failed to depart voluntarily within the prescribed time (T. 8). Petitioner waived his right to appeal the order of deportation to the Board of Immigration Appeals.

*References preceded by the letter "T" are to the tabs affixed to the Certified Administrative Record previously filed with the Court.

On April 22, 1974 petitioner's spouse submitted a motion to reopen the visa petition previously denied for lack of prosecution and Colato's deportation was stayed to permit an adjudication of the visa petition. On March 24, 1975 the District Director denied the visa petition (T. 4) and an appeal was taken to the Board of Immigration Appeals. In a decision dated September 15, 1975 the Board dismissed the appeal and found that on the record before the Board Mrs. Colato had not established that she had ever lived with the beneficiary (T. 2). By motion dated October 1, 1975 the District Director informed petitioner that he was to effect his voluntary departure by October 15, 1975 (T. 1).

This petition for review was filed on October 7, 1975 and petitioner's deportation has been stayed pursuant to Section 106(a)(3) of the Act, 8 U.S.C. §1105a(a)(3).

RELEVANT STATUTES

Immigration and Nationality Act of 1952, as amended:

Section 106, 8 U.S.C. §1105a -

(a) The procedure prescribed by, and all the provisions of sections 1031 to 1042 of Title 5, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title. . .

* * *

Section 204, 8 U.S.C. §1154 -

(a) Any citizen of the United States claiming that an alien is entitled to . . . an immediate relative status under Section 201(b) . . . may file a petition with the Attorney General for such classification.* * *

RELEVANT REGULATION

8 C.F.R. §3.1 Board of Immigration Appeals

* * *

(b) Appellate jurisdiction. Appeals shall be to the Board of Immigration Appeals from the following:

* * *

(5) Decisions on petitions filed in accordance with section 204 of the Act . . .

ARGUMENT

POINT I

THIS COURT LACKS JURISDICTION TO REVIEW THE BOARD'S ORDER SINCE THE ORDER IS NOT A FINAL ORDER OF DEPORTATION ENTERED IN A PROCEEDING UNDER SECTION 242(b) OF THE ACT

At the outset, it is well to note that the petitioner is not challenging the basic order of deportation. Review of that order is barred by the six month statute of limitation contained in Section 106(a)(1) of the Act, 8 U.S.C. §1105a(a)(1). Accordingly, the only order sought to be reviewed on this petition is the Board's order of September 15, 1975.

The Board's order of September 15, 1975 was entered pursuant to the appellate jurisdiction of the Board under 8 C.F.R. §3.1(b)(5) to review the District Director's denial of a visa petition filed pursuant to Section 204(a) of the Act, 8 U.S.C. §1154(a). The denial of a visa petition, however, is not a final order of deportation and is not made pursuant to administrative proceedings under Section 242(b) of the Act, 8 U.S.C. §1252(b). Such denials are not reviewable in the Court of Appeals on a direct petition. Cheng Fan Kwok v. Immigration and Naturalization Service,

392 U.S. 206 (1968). Initial review of the Board's order is available only in the District Court rather than in this Court on a petition for review under Section 106 of the Act. Accordingly, this Court lacks jurisdiction to review the Board's order dismissing the appeal taken by petitioner's spouse* from the denial of the visa petition by the District Director.

POINT II

THE BOARD PROPERLY FOUND THAT PETITIONER IS NOT ENTITLED TO THE REQUESTED IMMIGRATION BENEFITS.

A. Statutory background

Although we strenuously adhere to our position that the Court lacks jurisdiction to review the Board's order of September 15, 1975, we submit that the Board properly found that petitioner was not entitled to the requested immigration benefit. What petitioner's wife sought to obtain from the Service was not something to

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* We note that the visa petition which is the subject of the Board's order is a petition of Mrs. Colato filed on behalf of the petitioner herein. Mrs. Colato is not a party to this petition for review.

which either she or the petitioner had an automatic right but rather an immigration benefit for the petitioner which is regulated by statute and regulation. See 8 U.S.C. §1151, 8 U.S.C. §1154, 8 C.F.R. §204. Individuals claiming such benefits by virtue of marriage have the burden of establishing that the marriage relationship is bona fide and that the marriage was not contracted solely in order for the alien spouse to obtain an immigration benefit. Tang v. District Director, 298 F. Supp. 413 (C.D. Cal. 1969), aff'd 433 F.2d 1311 (9th Cir. 1970); Maderazo v. Farrell, 308 F. Supp. 1146 (D.C. 1970). Petitioner apparently contends that the Board fround his marriage to be invalid (petitioner's brief, p. 4-5). The decisions of the District Director and of the Board of Immigration Appeals denying the visa petition were not based upon a determination that the underlying marriage was unlawfully contracted or legally invalid, but rather that the petitioner's spouse, who is not a party hereto, had failed in her burden of proof to establish the bona fides of that marriage relationship for immigration purposes.

The burden of establishing that the marriage relationship is bona fide and that the marriage was not contracted solely in order for the alien spouse to obtain an immigration benefit rests upon the individual seeking the benefit. Tang v. District Director, supra. Where the citizen spouse is unable to sustain the burden of proof, the marriage is deemed invalid for immigration purposes regardless of whether it would be considered valid under the domestic law of the jurisdiction where it was performed. See Gordon and Rosenfeld, Immigration Law and Procedure, §218 (1975); Matter of M, 8 I. & N. Dec. 216 (BIA 1958).

The Supreme Court has held, in interpreting a similar statute which conferred non-quota status on the "alien spouses" of veterans, that the common understanding of a marriage which Congress must have had in mind when it made provision for the conferring of immigration benefits on alien spouses of citizens is that the two parties have undertaken to establish a life together and assume certain duties and obligations. Lutwak v. United States, 344 U.S. 604 (1953).

This Circuit has held that a marriage contracted solely to circumvent the immigration laws does not suffice to make the alien the "spouse" of a United States citizen so as to be entitled to immediate relative status. Kokkinis v. District Director, 429 F.2d 938 (2d Cir. 1970). See also Johl v. United States, 370 F.2d 174 (9th Cir. 1966). This Circuit has also held that Congress may adopt a federal standard to determine the bona fides of a marriage for the limited purpose of denying immigration priorities to persons whose marriages do not meet that standard. United States v. Diogo, 320 F.2d 898 (2d Cir. 1963). See also Scott v. Immigration and Naturalization Service, 350 F.2d 279, 282 (2d Cir. 1965); United States v. Sacco, 428 F.2d 264, 269 (9th Cir. 1970).

Thus, it is well-established that Congress, in enacting the provisions relating to immediate relative status, intended that only those aliens who have entered into a bona fide marriage relationship with a United States citizen are entitled to benefits under the immigration laws.

B. The record established that the petitioner is not entitled to immigration benefits as the spouse of a citizen

The procedures followed in determining whether petitioner is entitled to classification as the immediate relative, i.e., spouse, of an American citizen were in full accord with the statutory requirements and implementing regulations. When the couple were interviewed in November 1973 there were serious discrepancies in their statements. Shortly thereafter, in fact, Mrs. Colato indicated that she had no intention of prosecuting the visa petition filed on behalf of her husband. When the couple were again interviewed in February 1975 they admitted that they had separated in December 1973 and they have not reconciled at any time since that date.

Petitioner relies on the Ninth Circuit's decision in Bark v. Immigration and Naturalization Service, 511 F.2d 1200 (9th Cir. 1975) for the proposition that the sole fact of separation cannot be relied upon to determine that the marriage is not bona fide for immigration purposes.

Such reliance is totally misplaced since the decision of the Board clearly did not rely solely on the fact of the marital separation but also took into account the discrepancies uncovered in prior interviews of the couple.*

The couple were interviewed by experienced Service officers who had the function and ability to make an intelligent determination on the credibility of the testimony at the interview. Credibility is best evaluated in administrative proceedings by the officer directly observing the witness who is testifying. Kokkinis v. District Director, supra, at 941-42.

Decisions by the Attorney General or by his delegates regarding the approval of immigrant status pursuant to Section 204 of the Act are discretionary decisions and the scope of review of those decisions is extremely narrow. While reviewable for arbitrariness,

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*Although the Certified Administrative Record previously filed with the Court does not contain all of the record material which was before the Board, we have included in the appendix a copy of the notes of the Immigration and Naturalization Service investigator who interviewed the couple on November 16, 1973 to illustrate the discrepancies.

unless the decision is found to be without any rational explanation, or to depart inexplicably from established practices so as to rest on an impermissible basis, this Court should not substitute its judgment for that of the administrative agency nor make findings of fact. Li Cheung v. Esperdy, 377 F.2d 819, 820 (2d Cir. 1967); Tang v. District Director, supra; Nazareno v. Attorney General, 366 F. Supp. 1219, aff'd, 512 F.2d 936 (D.C. Cir. 1975).

CONCLUSION

The petition for review should be denied.

THOMAS J. CAHILL,

United States Attorney for the
Southern District of New York,
Attorney for Respondent.

MARY P. MAGUIRE,
THOMAS H. BELOTE,
Special Assistant United States Attorneys,
Of Counsel.

APPENDIX

A 20 110 038 F:af
A20 590 998 F:af.
Nov. 21, 1973.

MEMORANDUM FOR FILE

SUBJECTs: ATINUAEL COLATO A 20 110 038 (Husband-Beneficiary)
HERMINIA COLATO -A 20 590 998 (Wife -Petitioner).

Immigrant Insepctor Cutler, pointed out the following discrepancies & info ~~xxxxx~~ in the information supplied by SUBJECTs on Nov. 16, 1973.

She said they live over a restaurant.
He said - a regular 2 family house; and landlord lives downstairs; no restaurant.

She said he works 2 shifts - 9AM to 2PM; and 7 PM to ~~xx~~ 11 or 12 PM.
He said he work from 7:30 AM to 6:30 PM and stays home.

They know each other one month prior to marriage. She said he is 40. He said he is 45. She has a duaghter from another man;.

She did not know when he came home last night (i.e. night of 11/15/73).
He siad -came home 7:30 PM.

She did not know husband's birthday year.

She-he took bath and shower.
He -never takes a bath.

She he took a bafith last night and a shower the monring of 11/16/73.
He -Jus at shower this morning.

She could not identify the towels.

R$_e$ light in bathroom - he--small chain; she-wall switch.

She last night ate chicken, rice & beans --he said chicken & rice.
~~they~~ Her daughter
She- had farina for ~~xxxx~~ breakfast. -He --- Her dauther has coffee-milk- & bread.

He said she took a shower last night.
She said she hates showers and only bathes.

She said --he only had coffee for breakfast. He agreed to that.
She said she had eggs, bread and coffee.
He said she had only coffee.

She said--her daghter got up 1/2 hour after they got up.
He said--they all got up this morning, at the same time.

She said --only likeblack coffee.
He siad --she likes coffee with milk.

Alexander Hartstein
Assistant

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

CA 75-4221

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Pauline P. Troia,

being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 2

27th day of February, 19 76 she served a copy of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Rosenberg, Rosenberg & Rockman, Esqs.,
200 Garden City Plaza,
Garden City, NY 11530

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

27th day of February, 19 76

Ralph S. Lee

RALPH S. LEE
Notary Public, State of New York
No. 31-4504000, Queens County
Term Expires March 30, 1977